IN THE SUPREME COURT OF IOWA

NO. 12-2120

CHRISTOPHER J. GODFREY,

PLAINTIFF-APPELLANT,

v.

STATE of IOWA; TERRY BRANSTAD, Governor of the State of Iowa, individually and in his official capacity; KIMBERLY REYNOLDS, Lieutenant Governor of the State of Iowa, individually and in her official capacity; JEFF BOEYINK, Chief of Staff to the Governor of the State of Iowa, individually and in his official capacity; BRENNA FINDLEY, Legal Counsel to the Governor of the State of Iowa, individually and in her official capacity; TIMOTHY ALBRECHT, Communications Director to the Governor of the State of Iowa, individually and in his official capacity; and TERESA WAHLERT, Director, Iowa Workforce Development, individually and in her official capacity,

DEFENDANTS-APPELLEES.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE ROBERT A. HUTCHISON

APPELLANT'S REPLY BRIEF

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I. CERTIFICATE OF SERVICE

I, Roxanne Barton Conlin, hereby certify that I mailed one (1) copy of this REPLY BRIEF this 21st day of June, 2013, to the following:

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II. CERTIFICATE OF FILING

I, Roxanne Barton Conlin, hereby certify that I filed eighteen (18) copies of this REPLY BRIEF this 21st day of June, 2013, with the Clerk of the Iowa Supreme Court, Des Moines Iowa.

Roxanne Conlin

ROXANNE BARTON CONLIN

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A. *McGill* Does Not Stand for the Proposition that No Judicial Review of the Attorney General's Employment Scope Certification is Required

Defendants claim that the *McGill* case indicates that no judicial review of the Attorney General's certification regarding employment scope is required. (D's brief, p. 23). This is incorrect. In *McGill*, a state university employee injured on university property brought gross negligence claims against his co-workers. *McGill v. Fish*, 790 N.W.2d 113, 116 (Iowa 2010). The State filed a motion to dismiss for failure to comply with the administrative exhaustion requirements of the Iowa Tort Claims Act. *Id.* The plaintiffs argued that their claim was expressly authorized by Iowa Code § 85.20(2) and constituted an exception to the requirements of the ITCA as a claim brought pursuant to workers' compensation law. *Id.*

The issue the *McGill* Court faced was whether co-employee gross negligence claims brought by state workers were excluded from the provisions of the ITCA. *Id.*, at 120. It found that they were not. *Id.* While the *McGill* case references the Attorney General certification process in a footnote, it does not comment further or decide any issue with respect to such certification. Any argument by Defendants that this case stands for the proposition that certification is judicially unreviewable is simply wrong.

B. Principles of Statutory Interpretation May be Utilized to Define "Scope of Employment" Under the ITCA

Iowa Code § 669.2(1) states: "'Acting within the scope of employment of the employee's office or employment' means acting in the employee's line of duty as an employee of the state." Iowa Code § 669.2(1). Defendants contend that this language somehow creates a different standard for determining employment scope than would be used in analyzing non-ITLA claims. This is not the case.

In *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990), the federal district court found in favor of a female associate professor who alleged that sexual discrimination had created a hostile work environment and had been the cause of the university's failure to promote her. In doing so, the Court discussed the plaintiff's related slander suit brought in state court which resulted in a jury finding that the defendant in that case, another faculty member at the state university, had made defamatory statements about the plaintiff and that he had not proven that such statements were made and communicated within the scope of his employment. *Id.*, at 961.

The instruction given to the jury in the *Jew* state slander case used the § 669.2(1) definition of scope of employment, as stated above, but elaborated as follows:

> "An employee acts within the scope of employment when his conduct is of the same general nature as or incidental to the conduct normally performed by the employee. The following factors may also be considered: (1)

> [w]hether the employee was furthering the employer's business or interests; (2) [w]hether the conduct would accomplish a purpose of the employment; (3) [w]hether the employee intended to accomplish a purpose of the employment. If an employee's conduct is a substantial deviation from the employer's business or interests, it is outside the scope of employment. If the employee was acting solely in his own interest, he is acting outside the scope of employment..."

Jew, 749 F. Supp. 946, 967 (S.D. Iowa 1990).

Similarly, in *M.H. By and Through Callahan v. State*, 385 N.W.2d 533 (Iowa 1986), the Court found outrageous conduct or reckless disregard of the probability of causing emotional distress were not synonymous with willful and wanton conduct and therefore, were not "claims" under the Iowa Tort Claims Act. In so finding, the Court relied upon an analysis from the Restatement (Second) of Torts and from case law outside of the ITCA arena. *Id.*, citing, *i.e. Harsha v. State Savings Bank*, 346 N.W.2d 791, 801 (Iowa 1984); *Northrup v. Farmland Industries, Inc.*, 372 N.W.2d 193 (Iowa 1985); *Vinson v. Linn-Mar Community School District*, 360 N.W.2d 108 (Iowa 1984); Restatement (Second) of Torts, § 46 comment d (1965).

Clearly, it is appropriate to look to sources beyond the ITCA in analyzing terms and legal concepts, even those, such as "claim" and "scope of employment" that are defined within the act itself. That is the nature of statutory interpretation. Defendants' citation to the *Snyder* case does not aid their argument to the contrary. See generally, *Snyder v. Davenport*, 323 N.W.2d 225 (Iowa 1982). In *Snyder*, the

Court merely warned against adopting a common law negligence cause of action separate from the rights defined in Iowa's Dram Shop Act, Iowa Code § 123.49 *et al.* It did not address appropriate sources for defining words or phrases within the Act or in any way support Defendants' contention. It is perfectly acceptable for the Court to consider the scope of employment issue using factors set out in other Iowa cases, irrespective of whether such cases have been brought pursuant to the ITCA.

C. The Federal Tort Claims Act is Sufficiently Similar to the ITCA to Offer Persuasive Authority in this Case

Defendants maintain that the Federal Tort Claims Act, or the Westfall Act, is inapplicable to the case at bar. Irrespective of minor differences in statutory language, Defendants ignore the fact that the Iowa Legislature intended that the ITCA have the same effect as its federal counterpart. See, i.e. *Walker v. State*, 801 N.W.2d 548, 566 (Iowa 2011) ("The legislature intended the ITCA to have the same effect as the FTCA."); *Feltes v. State*, 385 N.W.2d 544, 547 (Iowa 1986) ("Because the Iowa Tort Claims Act (ITCA) is modeled after the Federal Tort Claims Act (FTCA), we have found that the legislature intended the Iowa Act to have the same effect as the FTCA."); *Adam v. Mount Pleasant Bank and Trust* 387 N.W.2d 771, 252 (Iowa 1986) ("Because our statute is based on the federal Tort Claims Act, we assume our legislature intended it to have the same meaning as the federal statute."); *Hubbard v. State*, 163 N.W.2d 904, 910-11 (Iowa 1969)

("[W]here...a state legislature adopts a federal statute [the FTCA] which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense."). Thus, Plaintiff has properly relied upon the FTCA and related federal case law. See, *Walker*, 801 N.W.2d 548, 566 (Iowa 2011) ("[W]e give great weight to relevant federal decisions interpreting the [FTCA]."). There is simply no reason to disregard federal case law as persuasive authority in this instance. While it is understandable that Defendants would argue otherwise, as such case law is generally unfavorable to Defendants' position, the Court should not deviate from the exceedingly standard practice of considering federal court decisions when the state statute at issue has a federal statutory counterpart.

D. Plaintiff Has Not Conceded That Iowa Code § 669.23 Would Bar His Claims

Defendants' statement that Plaintiff has conceded that Iowa Code § 669.23 would bar his claims against the individual Defendants is patently false. (D's brief, p. 18 n. 2). Plaintiff has made no such concession. Plaintiff's acknowledgment that Counts X – XV[1] cannot be maintained against the State pursuant to Iowa Code

[1] Count X Interference with Contractual Relations Against Individual Defendants; Count XI Interference with Prospective Business Advantage Against Individual Defendants; Count XII Defamation Against Defendant Reynolds; Count XIII Defamation Against Defendant Albrecht; Count XIV Defamation Against Defendant Branstad; Count XV Defamation Against Defendant Boeyink. (P's Amended Petition, App. 1-31).

§ 669.14 in no way translates to a concession that such counts cannot be brought against individual state employees acting outside of the scope of their employment. Iowa Code § 669.23 does not save Defendants' argument. ("Employees of the state are not personally liable for any claim which is exempted under section 669.14."). The scope of employment analysis must still be applied. Otherwise, an employee of the state would **never** be liable for the exemptions listed in § 669.14.

The Iowa Legislature has cautioned that the Iowa Code's "provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice." Iowa Code § 4.2. Among the most venerable of the canons of statutory construction is the one stating that a statute should be given a sensible, practical, workable, and logical construction. *Taft v. Iowa District Court ex rel. Linn County*, 828 N.W.2d 309, 317 (Iowa 2013) (citations omitted). Courts seek to avoid statutory interpretations that are unreasonable. *Fjords North, Inc. v. Hahn*, 710 N.W.2d 731, 739 (Iowa 2006) (citations omitted). It is widely understood that absurd results should be avoided. *Emmetsburg Ready Mix. Co. v. Norris*, 362 N.W.2d 498, 499 (Iowa 1985) (citations omitted).

It would be illogical to conclude that the Iowa Legislature intended to protect employees of the state from liability outside of the employment arena. If this were the case, a state employee could commit any of the tortious acts listed in

§ 669.14 in any context whatsoever, no matter how unrelated to his or her employment, and be absolutely immune. Thus, it is clear that for such immunity to apply, a state employee must be acting within the scope of employment, necessitating an inquiry into the facts and circumstances surrounding the challenged actions in order to determine whether they were taken within this scope. The Attorney General certification is but one element of a proper inquiry into this issue. It may be evidence of the parameters of the employment scope in any given situation, but it is not, and should not be, viewed as conclusive.

E. Plaintiff Properly Preserved for Appeal His Argument Based Upon the *Berry* Case

Defendants' claim that Plaintiff failed to preserve error with respect to any argument stemming from *Berry v. State Dept. of General Services*, 917 P.2d 1070 (Or. Ct. App. 1996) based solely upon Defendants' allegation that Plaintiff's counsel conceded this issue at oral argument is preposterous. Defendants know it is preposterous because, not only do they fail to offer a single citation for this bizarre procedural conclusion, they go on to address this argument wholeheartedly in their appellate brief, in a futile attempt to explain how *Berry* is, in fact, inapplicable. (D's Brief, pp. 5, 21, 22).

Plaintiff **did not** concede his arguments based upon *Berry*, as Defendants would have this Court believe. Plaintiff's counsel's statement at a hearing before the district court that there are differences in the language of the Oregon statute

and the corresponding Iowa statute is, first and foremost, absolutely factual – the language of the two statutes is not identical and Plaintiff has never argued otherwise. However, this acknowledgement in no way implies that Plaintiff has abandoned his reliance upon *Berry* and Defendants could not have had a good-faith belief that this was the case. Nor does it provide a legitimate reason for this Court to decline to consider such arguments. Defendants' attempt to twist the rules in order to bolster their own position should not be permitted.

This Court has been reluctant to place alleged irregularities in form over substance in preservation of error issues. For example, in *Lee v. State, Polk County Clerk of Court*, 815 N.W.2d 731 (Iowa 2012), the plaintiff alleged that the State failed to preserve error because it did not claim Tenth Amendment sovereign immunity in district court. Instead, the State alleged only Eleventh Amendment sovereign immunity, which it asserted applied equally in state and federal court. *Id.*, at 738. Even though the district court recognized the immunity argument, the plaintiff argued that it was not properly raised and, as a result, was not preserved for review. *Id.*

The Iowa Supreme Court disagreed. While recognizing that the fundamental doctrine of appellate review requires that issues must be raised in the district court before they may be reviewed on appeal, the Court stated that it would not "exalt form over substance when the objectives of our error preservation rules have been

met", and found that the State had preserved its immunity argument. *Lee*, 815 N.W.2d 731, 739 (Iowa 2012) (citation omitted). Ultimately, the Court found that the State had argued its immunity from suit, the plaintiff had an opportunity to dispute the State's argument, and the district court rendered a decision after hearing both sides. *Lee*, 815 N.W.2d 731, 739 (Iowa 2012). This, it found, was sufficient to preserve the issue for appeal. *Id.*

Significantly, the *Lee* Court observed that nothing in the proceedings would have been altered had the State argued the source of its immunity differently. *Lee*, 815 N.W.2d 731, 739 (Iowa 2012). Likewise, in the case at bar, the proceedings in the district court would have been no different had Plaintiff's counsel's remark at the hearing gone unspoken. Defendants were aware of and had ample opportunity to respond to Plaintiff's argument regarding the *Berry* reasoning and the district court was able to consider both sides and rule on the issue. (11/1/12 Order, p. 5, App. 78).

Issue preclusion rules are not designed to be hyper-technical. *Griffin Pipe Products Co. v. Board of Review of County of Pottawattamie*, 789 N.W.2d 769, 772 (Iowa 2010) (finding that party generally challenged the overall amount of a tax assessment in the district court and the party's failure to challenge specific subparts of the assessment was not fatal to the preservation of the issue for appeal). See also, *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006) ("Error

preservation does not turn...on the thoroughness of counsel's research and briefing so long as the nature of the error has been timely brought to the attention of the district court.").

The purpose of the rules regarding issue preservation and preservation of error is to avoid asking an appellate court to address an argument which the district court did not have an opportunity to consider or which the district court failed to resolve once properly submitted for adjudication. See, *Vincent v. Four M Paper Corp.*, 589 N.W.2d 55, 64 (Iowa 1999); *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 671 (Iowa 2005), quoting *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) (additional citation excluded). Here, the arguments based upon *Berry* were submitted to the district court and the court rendered its decision. The standard for preservation of the issue has been met. Plaintiff's counsel's statement regarding the fact that the two statutes in question are not identical was not a concession of this argument and does not negate its preservation.

F. Plaintiff Does Not Challenge the Concept of Governmental Immunity or the Constitutionality of Iowa Code § 669 as Written

Defendants' claim that governmental immunity would be rendered "meaningless" under Plaintiff's interpretation of Iowa Code § 669.5(2)(a) is overreaching and preposterous. (D's brief, p. 11). Plaintiff has no quarrel with the general concept of governmental immunity. It is well settled that except where consent has been given by the legislature, the state is immune from suit. See

generally, *Graham v. Worthington*, 259 Iowa 845, 860-61, 146 N.W.2d 626, 636-37 (1966); *Dohmen v. Iowa Department for the Blind*, 794 N.W.2d 295, 300 (Iowa Ct. App. 2010). Nor does Plaintiff dispute that state employees cannot be sued in their individual capacities for acts committed within the scope of their
See, Iowa Code § 669.5. However, expansion of such immunity to state employee conduct that falls outside of the employment scope must not be allowed. It is this kind of beyond-the-employment-scope conduct to which Plaintiff objects, in terms of the application of immunity. Defendants' misguided attempt to characterize Plaintiff's argument as an attack on well-established and firmly entrenched principles of law must fail.

The "smooth functioning" of state business and quick dismissals of potential suits against the state, to which Defendants refer, must not trump the need for careful exploration of the employment scope issue. (D's brief, p. 11). Whether a defendant employee was with his or her employment scope at the time of an incident at issue is central to the claim itself. Indeed, the case may well turn on the answer to this question. Expanding immunity beyond its proper boundaries in order to aid speed and efficiency in dispatching possible valid claims against state actors is contrary not only to public policy, but to the spirit and purpose of the ITCA.

Nor does Plaintiff take issue with the constitutionality of Iowa Code § 669.5(2)(a) as written. The ITCA has passed constitutional muster and possesses a constitutionally sufficient public purpose. *Graham*, 259 Iowa 845, 860-61, 146 N.W.2d 626, 636-37 (1966). Plaintiff does not allege that the statute is unconstitutional on its face. An unconstitutional interpretation and application of the statute is what Plaintiff seeks to avoid. There is a stark difference between challenging the constitutionality of a statute as written and challenging the constitutionality of its application. See, *Baker v. City of Iowa City*, 260 N.W.2d 427, 430 (Iowa 1977); *City of Des Moines v. Lavigne*, 257 N.W.2d 485, 486 (Iowa 1977). Defendants mischaracterize Plaintiff's argument.

G. Plaintiff's Cause of Action Against the Individual Defendants Has Accrued and Is a Vested Property Right

Defendants claim Iowa Code § 669 prevented Plaintiff's cause of action from accruing and, as such, Plaintiff has not been unconstitutionally deprived of a property right. (D's brief, pp. 24, 25). They argue, "Plaintiff never had a right to sue the state on causes of action for which the state and its employees retain immunity." (D's brief, p. 24). Of course Plaintiff does not have such a right – it is clear that if a state employee is acting within the employment scope, immunity from certain causes of action attaches. The trouble with Defendants' argument is that it assumes that the individual Defendants were acting ***within*** their employment scope. This, however, is not the case. Therefore, Plaintiff has accrued a cause of

action against Defendants in their individual capacities for their wrongdoing outside of their employment scope.

For example, a tort action "accrues" when all elements of the cause of action have occurred and can be alleged in a proper complaint. *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457, 460-61 (Iowa 1989). The four elements for consideration in making this determination are:

1. the existence of a legal duty by the defendant toward the plaintiff;
2. the breach of such duty;
3. a proximate causal relationship between the breach of such duty and an injury to the plaintiff;
4. the plaintiff suffers injury.

Id., at 460, citing *Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 200 N.W.2d 70, 72 (Mich. 1972). Defendants in the present case owed Plaintiff a duty which they breached, proximately causing Plaintiff's injuries. His cause of action against them has accrued.

Defendants mistakenly cite the *Harden* case in support of their position. However, in *Harden*, the plaintiff argued that the statute of limitations imposed by the ITCA violated her due process rights. *Harden v. State*, 434 N.W.2d 881, 886 (Iowa 1989). In rejecting this argument, the Court observed that, by definition, statutes of limitations are arbitrary and will be upheld unless otherwise

unreasonable. *Id.* (citation omitted). It was within this context that the issue was decided.

The present case, however, does not turn on the constitutionality of the ITCA's statute of limitations, but on the question of whether depriving an injured plaintiff of a cause of action based solely upon an unreviewable certification from the state's Attorney General violates that plaintiff's constitutional rights. It is well-settled that the statute of limitations delineated within the ITCA is constitutional. See, *Harden*, 434 N.W.2d 881, 886-87 (Iowa 1989). The constitutional ramifications of denying the courts review of the Attorney General's certification, however, has not yet been established. That is the question before this Court today and *Harden* poses no obstacle to the Court's consideration of this issue.

H. The Doctrine of Separation of Powers is Not Violated By Judicial Review of the Attorney General's Certification Regarding Employment Scope

As a preliminary matter, Plaintiff wishes to reiterate that the separation of powers issue was not raised prior to appeal. Nor has either party to this litigation raised the issue. It has come before the court though an amicus curaie brief filed in support of Defendants' position by the National Governors Association (hereinafter "NGA"). Thus, this issue is not properly before this Court and should not be considered in the resolution of this matter. See, *Leutfaimany v. State*, 828 N.W.2d 632, *2 (Iowa Ct. App. 2013) (Table) ("Leutfaimany never

argued....separation of powers before the district court. As [it was] not raised prior to this appeal, we have nothing to review on [this] newly formulated constitutional [claim]."). In the alternative, Plaintiff's position with respect to this issue is set forth, below.

The separation of powers clause of the Iowa Constitution provides:

> "The powers of the government of Iowa shall be divided into three separate departments – the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

Iowa Const. art. III, § 1. The three branches of government have "a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which would preclude the establishment of a nation capable of governing itself effectively." *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 854 (Iowa 2001), quoting *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (further quotation omitted). "[H]armonious cooperation among the three branches of government becomes fundamental to our system of government." *State v. Hoegh*, 632 N.W.2d 885, 889 (Iowa 2001).

Thus, the separation of powers doctrine does not have rigid boundaries. Some functions of government will inevitably intersect. *Klouda v. Sixth Judicial District Dept. of Correctional Services,* 642 N.W.2d 255 (Iowa 2002). The doctrine is violated only when one branch of the government purports to use

powers that are clearly forbidden or attempts to use powers granted by the constitution to another branch. *Id.*, at 260, citing *State v. Phillips*, 610 N.W.2d 842 (Iowa 2000). The executive branch has the general power to execute and carry out the laws, while the judiciary has the power to interpret the Constitution and the laws, apply them and decide controversies. *Doe v. State*, 688 N.W.2d 265, 271 (Iowa 2004) (citation omitted). It is the legislature's duty to declare the law and the judiciary's responsibility to interpret such laws. *Lynch v. Saddler*, 656 N.W.2d 104, 108 (Iowa 2003).

The NGA claims in the present case that the Iowa judiciary would be encroaching upon the executive branch, namely Defendant Branstad's constitutional authority as governor, if it is allowed to consider the scope of employment issue pursuant to Iowa Code § 669.5. (NGA's brief, p. 10). No explanation for this unfounded conclusion is offered. Iowa Code § 669.5 was created by the Iowa Legislature. Its interpretation and application are appropriate subjects of judicial review, a process that in no way impinges upon any executive branch duty or power. See, i.e. *NextEra Energy Resources, L.L.C. v. Iowa Utilities Board*, 815 N.W.2d 30, 44 (Iowa 2012) (It is well established and entirely within the province of the judiciary to determine the constitutionality of legislation enacted by other branches of government.)

The remainder of the NGA brief suggests to this Court in rather remarkable fashion that, in accordance with his position as the State's governor, Defendant Branstad is somehow above the law. It argues essentially that the "supreme executive" and his "closest advisors" should have special status beyond the scope of other governmental employees or public servants, with respect to accountability for wrongdong. This position is not only arrogant and unsupported, but absolutely incorrect.

In *Clinton v. Jones*, 520 U.S. 681 (1997), a former state employee sued the sitting President of the United States for sexual harassment and retaliation that had allegedly occurred before the President took office. In denying the President's motion to dismiss and reversing the District Court's stay of proceedings, the United States Supreme Court held that: (1) in all but the most exceptional circumstances, the President is not afforded temporary immunity from civil damages litigation arising out of events that occurred before he took office, (2) the doctrine of separation of powers did not require the federal courts to stay all private action against the President until he left office, and (3) the District Court abused its discretion in deferring trial until after the President left office. *Id.*

In so deciding, the Court explained:

> "The conduct of [public servants'] official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the

> public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion."

Clinton, 520 U.S. 681, 693-94 (1997). Significantly, the Court concluded that the aforementioned rationale for affording certain public servants immunity from suit is ***inapplicable to unofficial conduct***, or that undertaken outside of the proscribed employment scope. *Id.* (emphasis added). In so holding, the Court distinguished its decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), upon which the NGA relies in the present case, finding that the *Nixon* reasoning in support of immunity was inapplicable to situations involving unofficial conduct.[2] *Clinton*, 520 U.S. 682 (1997).

The *Clinton* Court stated:

> "[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity...Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent."

Clinton, 520 U.S. 681, 694-95 (1997).

The President in *Clinton* argued that he occupied a "unique office with powers and responsibilities so vast and important that the public interest demanded that he devote his undivided time and attention to his public duties" and that the separation of powers placed limits on the authority of the judiciary to "interfere"

[2] The *Nixon* Court held that the former president was entitled to absolute immunity from damages liability predicated on his ***official*** acts. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (emphasis added).

with the executive branch by allowing the civil action against him to proceed. *Clinton*, 520 U.S. 681, 697-98 (1997). The Court dismissed this argument in its entirety.

> "[I]t is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have the power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere byproduct of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and occasional invalidation of his official actions."

Id., at 705. The NGA's argument in the present case based upon Defendant Branstad's status as the state governor should be similarly dismissed.

In addition, the *Clinton* Court held that the judiciary was not being asked to perform any function that might in some way be described as "executive". *Clinton*, 520 U.S. 681, 701 (1997). It found no possibility that the scope of the official powers of the executive branch were in any way curtailed. "The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power." *Id.*, at 702. As such, the NGA's separation of powers argument is inapplicable.

I. The *Muzingo* Decision Does Not Stand For Governmental Immunity Outside of the Employment Scope

The NGA claims that "this Court has already shielded judicial officers from civil suit, even when they are 'accused of acting maliciously and corruptly'." (NGA's brief, quoting *Muzingo v. St. Luke's Hospital*, 518 N.W.2d 776, 777 (Iowa 1994)). In *Muzingo*, the Iowa Supreme Court held that the court-appointed psychiatrists and hospitals that are requested by a district court to render an opinion regarding a patient's mental health are entitled to absolute quasi-judicial immunity from suit. *Id.*, at 777-78. In doing so, the Court stated:

> "Iowa has long recognized that judges have absolute immunity from damages for acts committed ***within their judicial jurisdiction***. (citation omitted). This immunity has been applied even when the judge is accused of acting maliciously and corruptly because as a matter of policy it is in the public's best interest that judges should exercise their function without fear of consequences and with independence."

Id., at 777 (emphasis added). That judges are afforded immunity for actions taken within their judicial jurisdiction in no way supports the notion that a governor or governmental employee is afforded similar immunity for actions taken ***outside*** of their employment scopes. *Muzingo* offers no support for the NGA's position.

VI. Conclusion

Defendants and the NGA have presented a medley of misleading arguments that do not stand up to judicial scrutiny. Based upon the reasoning in this reply, as set out above, and that presented in Plaintiff's Proof Brief previously filed, Plaintiff strongly urges this Court to find that the District Court erred in granting Defendants' Motion with respect to the Attorney General certification issue and to

further find that judicial review of such certification regarding employment scope pursuant to Iowa Code §669.5(2)(a) is required.

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Certificate of Cost

We hereby certify that the cost of printing the foregoing Reply Brief of Plaintiff-Appellant was $ 87.13 .

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4871 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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Roxanne Conlin

Signature

6/21/13

Date